UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIA HENRY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 22 C 125
	)	
BROWN UNIVERSITY, et al.,	)	Chicago, Illinois
	)	August 2, 2022
Defendants.	)	11:02 a.m.

TRANSCRIPT OF PROCEEDINGS - MOTION HEARING

BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES:

For the Plaintiffs:

ROCHE FREEDMAN LLP
BY: MR. EDWARD J. NORMAND
MR. KYLE ROCHE
99 Park Avenue, Suite 1910
New York, New York 10016
(646) 970-7513

GILBERT LITIGATORS & COUNSELORS
BY: MR. ROBERT D. GILBERT
11 Broadway, Suite 615
New York, New York 10004
(646) 448-5269

BERGER MONTAGUE PC
BY: MR. ERIC L. CRAMER
1818 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
(215) 875-3009

FEGAN SCOTT, LLC
BY: MS. ELIZABETH A. FEGAN
150 South Wacker Drive, 24th Floor
Chicago, Illinois 60606
(312) 741-1019

APPEARANCES: (Continued)

For the Plaintiffs: HELLRING LINDEMAN GOLDSTEIN & SIEGAL LLP
BY: MR. ROBERT S. RAYMAR
One Gateway Center
Newark, New Jersey 07102
(973) 621-9020

For the Defendants:
Brown University: MORGAN, LEWIS & BOCKIUS, LLP
BY: MR. KENNETH M. KLIEBARD
110 North Wacker Drive, Suite 2800
Chicago, Illinois 60606
(312) 324-1000

California Institute of Technology: COOLEY LLP
BY: MR. MATTHEW L. KUTCHER
110 North Wacker Drive, Suite 4200
Chicago, Illinois 60606
(312) 881-6500

University of Chicago: ARNOLD & PORTER
BY: MR. JAMES L. COOPER
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Columbia University: SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
BY: MR. PATRICK J. FITZGERALD
MS. AMY VAN GELDER
155 North Wacker Drive, Suite 2700
Chicago, Illinois 60606
(312) 407-0508

Cornell University: KING & SPALDING, LLP
BY: MR. NORMAN ARMSTRONG, JR.
MR. ZACHARY T. FARDON
1700 Pennsylvania AVenue, NW, Suite 200
Washington, DC 20006
(202) 626-8979

APPEARANCES: (Continued)

Dartmouth College:
JENNER & BLOCK LLP
BY: MS. TERRI L. MASCHERIN
353 North Clark Street
Chicago, Illinois 60654
312-222-9350

Duke University:
GIBSON, DUNN & CRUTCHER LLP
BY: MR. CHRISTOPHER D. DUSSEAULT
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7855

Emory University:
JONES DAY
BY: MS. TINA M. TABACCHI
110 North Wacker Drive, Suite 4800
Chicago, Illinois 60606
(312) 782-3939

JONES DAY
BY: MR. HASHIM M. MOOPPAN
51 Louisiana Avenue, N.W.
Washington, DC 20001 (202) 879-3939

Georgetown University:
MAYER BROWN LLP
BY: MS. BRITT M. MILLER
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Massachusetts Institute of Technology:
FRESHFIELDS BRUCKHAUS DERINGER
BY: JAN RYBNICEK
DAPHNE LIN
700 13th Street NW, 10th Floor
Washington, DC 20005
(202) 777-4500

GOLDMAN ISMAIL TOMASELLI BRENNAN & BAUM LLP
BY: RAMI N. FAKHOURI
200 South Wacker Drive, 22nd Floor
Chicago, Illinois 60606
(312) 881-5964

APPEARANCES: (Continued)

Northwestern University:	SIDLEY AUSTIN LLP BY: MR. SCOTT D. STEIN One North Dearborn Street Chicago, Illinois 60603 (312) 853-7000
University of Notre Dame:	WILLIAMS & CONNOLLY LLP BY: MR. MATTHEW D. HEINS MR. JONATHAN PITT 680 Maine Avenue, SW Washington, DC 20024 (202) 434-5073
University of Pennsylvania:	WILMER CUTLER PICKERING HALE and DORR LLP BY: MR. SETH P. WAXMAN 1875 Pennsylvania Avenue, NW Washington, DC 20006 (202) 663-6000
	WILMER CUTLER PICKERING HALE and DORR LLP BY: MR. DAVID GRINGER 7 World Trade Center New York, New York 10007 (212) 230-8864
	MILLER SHAKMAN LEVINE & FELDMAN LLP BY: MR. EDWARD W. FELDMAN 180 North LaSalle Street, Suite 3600 Chicago, Illinois 60601 (312) 263-3700
The Johns Hopkins University:	ROPES & GRAY LLP BY: MR. JEFFREY J. BUSHOFSKY 191 North Wacker Drive, 32nd Floor Chicago, Illinois 60606 (312) 845-1200

APPEARANCES: (Continued)

United States of America:
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
BY: MR. ERIC DUNN
950 Pennsylvania Avenue, NW Room 3415
Washington, DC 20530
(202) 431-6727

Court Reporter:
Brenda S. Tannehill, CSR, RMR, CRR
Official Court Reporter
219 South Dearborn Street, Suite 1928
Chicago, Illinois 60604
(312) 554-8931
brenda_tannehill@ilnd.uscourts.gov

(Proceedings heard in open court:)

THE CLERK: Case 22 C 125, Henry versus Brown University.

THE COURT: Okay. So somebody gave me a list of counsel who are here for the defendants. I am hoping what that means is that not all 27 people or however many it is feel the need to get up your give your names and we can just kind of put this into the record.

Does that sound right to everybody?

A VOICE: That was the intent, Your Honor.

THE COURT: Everybody's nodding. All right. So I don't know what the count is on the plaintiffs' side.

MR. NORMAND: In terms of who's speaking, Your Honor?

THE COURT: No. In terms of how many people are here.

MR. NORMAND: Probably 10 or 12.

THE COURT: Okay. Maybe if you guys could put together -- it can be handwritten -- a list, we can put that all in there and then just have the people who are talking give your names.

And so the protocol is going to be that if you're arguing, you can take your face mask off. And I kind of hope you will because it will be a little bit easier to hear. Otherwise, keep it on.

If somebody can let me know what the plan is here, is

it going to be divided up on the defense side? And if so, can somebody tell me how?

MR. WAXMAN: Yes, Your Honor.

THE COURT: It's better if you're talking into a mic, so it's okay to stay sitting. Just pretend you're trying a case in South Carolina or something.

MR. WAXMAN: For all these years, I find it incredibly --

THE COURT: I'm with you, you know.

MR. WAXMAN: Your Honor, my name is Seth Waxman. I'll be presenting the argument for all 17 defendants with respect to the omnibus motion to dismiss that's been filed for everybody.

Hashim Mooppan, who is the third one at this table, will be presenting argument if the Court wishes to hear argument with respect to Brown, Chicago, and Emory, the so-called withdrawn schools.

THE COURT: Okay.

MR. WAXMAN: And in the event that the Court might wish to hear from him, I'd like to allocate two minutes of my 20.

THE COURT: That's about right because I think I might have, like, one question for him which he probably can anticipate because it has to do with who's got the burden on withdrawal. If he can anticipate it, now he knows what it is

so he can plan it for the next 18 minutes.

And you want to save some time for rebuttal, too?

MR. WAXMAN: Yes, please. If the Court would permit, I'd like to save five minutes.

THE COURT: Okay. Fine.

And on the plaintiffs' side, is one person going to do everything, or are you going to divide it up, or what?

MR. NORMAND: That's right, Your Honor.

Ted Normand.

THE COURT: As far as when you argue -- and I don't know how these podiums got moved -- or maybe it's podia -- how they got moved all the way over here or whatever. How the mics work, if you prefer to stand up, go for it.

Mr. Waxman, you've got the floor.

MR. NORMAND: Your Honor, I'm sorry to interrupt. It's Ted Normand.

We do have the government here, and we had a call with Your Honor last week.

THE COURT: Yeah. He's going to be on your side.

MR. NORMAND: I just wanted to understand the order, Your Honor.

THE COURT: Yeah. That person can give his or her name when they get up.

Mr. Waxman, you can go ahead.

MR. WAXMAN: Your Honor did say I could remove this?

THE COURT: Yes, please do.

MR. WAXMAN: May it please the Court.

For over 30 years, with the express encouragement of both Congress and the Department of Justice, universities practicing need-blind admissions have collaborated on a census methodology to more accurately determine what an applicant's family can reasonably afford to pay.

This lawsuit imperils that important encouraged collaboration by arguing first that defendants are not entitled to the 568 exemption; and second, that their conduct is price fixing that is per se illegal. And in any event, that at unreasonable -- it is in any event an unreasonable restraint of trade in a relevant market.

Both positions are wrong as a matter of law. In addition, the plaintiffs have also failed to plausibly allege any antitrust injury which is independent grounds for a dismissal.

Now, as to the exemption, under any reasonable reading of the text, history, context, and heretofore uniform understanding of the meaning of 568, plaintiffs' interpretation of "need blind" is wrong.

THE COURT: Can I interrupt you? What do you mean by "heretofore uniform understanding"?

MR. WAXMAN: So what I mean is that they have not cited a single instance, and we have not found one, in which

anyone referred to "need blind" as an insistence that the financial circumstances of the applicant cannot be taken into account by admissions people for any reason whatsoever even having nothing to do with the need for financial aid.

THE COURT: Has the 568 exemption ever been litigated before?

MR. WAXMAN: 568 -- no, it has not.

THE COURT: Why would you expect somebody to have found an instance if it hasn't been litigated?

MR. WAXMAN: Oh, I'm not talking about in court, but, for example, in all of the so-called overlap litigation that culminated in *Brown v. MIT* -- I'm sorry -- *United States v. Brown and MIT*, in all of the congressional debates -- not debates but all the legislative history that we've cited in our brief in which Congress in reports accompanying the enactment and reenactment and reenactment, there's not the slightest indication that a school is ineligible to participate in Section 568 if, for example, it considers financial circumstances for purposes of giving a tip to applicants from low socioeconomic backgrounds.

THE COURT: I want to come back that to specific example in a second, but I want to go back to the general point. So I guess my question is: Why does anybody get past the language of the statute?

I mean, this is a case in which there's a statute.

It has words in it that have meaning, and it has a specific definition of "need blind." So first of all, 568(a) says all students admitted are admitted on a need-blind basis. It doesn't say "some," it doesn't say "most," it doesn't say "everybody except the people on the wait list." And then it defines "need blind" in specific words without regard to the financial circumstances of the student involved or the student's family.

And I guess it seems to me the principal argument on this exception is whether it actually means those words or whether it means something else. And the plaintiffs are arguing -- you guys are arguing for something other than the plain meaning.

MR. WAXMAN: So first of all, the words "financial circumstances," which is what this argument is all about, is an undefined term. But this case is really controlled by United *States v. Bond*, the Supreme Court's decision involving the chemical weapons -- the statute that enacted domestically the chemical weapons ban.

The Court then said that even where a dictionary definition of a term reads a particular way, when context, history, and common sense show that the financial circumstances that can't be considered are the need for financial aid, that governs.

Financial aid is what this statute is all about.

It's mentioned in every subsection of 568.

THE COURT: Okay. So I want to make sure I'm completely getting this. So the term that's undefined, as you said, is the term "financial circumstances" as it appears in the definition of "need-blind basis." Am I right so far?

MR. WAXMAN: Yes.

THE COURT: And you're saying that that use of the term "financial circumstances" means what exactly as it relates to this case?

MR. WAXMAN: Yes. So what it means is any information that is in the application for financial aid or any information about financial circumstances that is used as a proxy for the need for financial aid. And it can't mean anything more than that consistent with the context of the statute and, frankly, with the structure --

THE COURT: So what you're basically saying -- I mean, and I know you've said other things, obviously, but what you're basically saying here is that the statute can't mean that I as an admissions officer can't look at Jane Jones, an applicant who comes from a disadvantaged background, and say, "I can't consider that at all, period, that she's disadvantaged financially" because that would be considering financial circumstances.

MR. WAXMAN: Yes.

THE COURT: That's the point you're making right now?

MR. WAXMAN: That's our --

THE COURT: Basically, what you're saying is that that would be an absurd result because it would be contrary to the whole purpose of the statue which is to expand financial aid, if you will?

MR. WAXMAN: Well, not only expand financial aid but to encourage schools to give a tip for low-income students whether they get financial aid or not.

I mean, to read "financial circumstances" the way that the plaintiffs are reading it actually renders the word "need" surplusage; and therefore, even thinking about this on textual terms only, it can't be the right reading.

THE COURT: So how do we get there, though? I mean, if that's the right result, what's the route to get there? If the right result is don't read "financial circumstances" to mean I can't consider anything about the person's or their family's finances, what's the analytical route to get there?

MR. WAXMAN: So I think the analytical route to get there is -- just thinking about the context of this statute is -- and all of the discussions about it and its predecessor that was governed by the MIT standards of conduct that the Justice Department endorsed was all about the need for financial aid.

There's no indication that anybody ever thought that schools couldn't consider anything involving financial

circumstances for any other purpose with respect to an admissions decision. It's only if it is financial circumstances that bear on them insofar as they bear on the need for financial aid.

And the legislative history of this which we've cited is Congress makes clear this means that to be eligible, you cannot consider information from the financial aid application, --

THE COURT: Right.

MR. WAXMAN: -- and you cannot consider other financial circumstances and use it as a proxy for what might be.

THE COURT: So let me ask you what I think then is the next logical follow-up. Let's say I'm with you so far. I'm not saying that, but let's just say hypothetically that I'm with you so far and that the statute can't be read to preclude an institution from considering, let's say, the adverse financial circumstances of an applicant.

That's not what the plaintiffs are suing about in this case, right? They're suing about kind of the opposite end of that. They're suing about considering -- at least part of what they're suing about is considering the nonadverse or opposite of adverse financial circumstances.

So let's say you're right about the definition. How does that mean that you win on this motion, I guess?

MR. WAXMAN: Well, for one thing, their resort to that interpretation demonstrates that even they don't really believe that a literalist reading of the text explains what it really means.

Their point, as I understand it, is, well, there are some schools, we understand, that in some instances will consider during the admissions process whether an applicant's family has been, you know, enormously supportive in donations or otherwise; and therefore, they may take into account that accepting this applicant would produce a very substantial contribution of some sort to the school.

Now, I don't think that that can possibly be what Congress ever intended because a school is need aware only if it considers financial circumstances in the context of the need for financial aid, not in a separate context like the ability to support the missions of the school.

And I think one way that's helped me think about this is donor preferences would exist even if a school offered no financial aid or if the school gave every applicant a free ride or every applicant that needed any assistance a complete free ride. So donor preference is not about the need for financial aid. It's not with respect to the need for financial aid.

In the context of a potential large donation, no one is saying, "Wow, that's great. She won't need financial aid."

That's my best shot.

THE COURT: Okay. But aren't the plaintiffs alleging that exactly that's what's happening, "Oh, that's great. She won't need financial aid. Let's let her in"?

MR. WAXMAN: I mean, I don't understand anything in their complaint to allege that, and I'd be really surprised.

I mean, the fact of the matter is that in between students who need financial aid and the few students or applicants, rather, whose admission may result in a substantial contribution is the vast middle of people, applicants who don't need financial aid but are not in a position to give an outsized donation.

THE COURT: I'm not sure who that is, but whatever. That's the people in between the billionaires and the people who have no money which --

MR. WAXMAN: No. I actually --

THE COURT: I don't know what it costs to go to college these days. I'm kind of out of the sending-people-to-college business.

MR. WAXMAN: If you look at Exhibit F to the plaintiffs' amended complaint which was attached to a revised or supplemental declaration of Mr. Litan, you will see what the net price is that the schools charged in 2021 and the incredible variation between the amount of financial aid they gave and the net price to students.

THE COURT: Let me go about this in a little bit of a different way, and I think I probably asked a question inartfully.

So your previous point was that the plaintiffs' allegedly literal reading of the exemption can't be right because it leads to this absurd result. Okay. And so therefore, what? What's the right reading then?

How do we get from there -- in other words, the literal reading would lead to an absurd result because of this one thing that eliminates being able to consider somebody's adverse financial circumstances. How do we get from there to basically, I mean, their characterization is blowing the doors open and you can consider anything you want about finances?

MR. WAXMAN: I mean, I think you get there by reading the statute the way that Congress understood the statute when it adopted it which is "need blind" means that you may not consider in the admissions process any information in the financial aid application, and you can't have an end run around it by considering financial circumstances that otherwise might appear.

And Congress actually said, "Look, we therefore encourage schools to not allow admissions officers in the admissions process to view the financial aid application."

THE COURT: So how am I supposed to know that that's how Congress understood it?

I mean, is the assumption that they were only attacking this prior arrangement that was sued about in *US v. Brown and MIT*, or how do I know that that's how Congress understood it? I guess that's my question.

MR. WAXMAN: I think that you can understand it in a variety of ways, one from the reports accompanying the enactment and reenactment of 568 including the text that I just paraphrased for Your Honor.

You also can understand it because as *Bond* teaches, even if a particular term has a dictionary definition -- and here, it is an undefined term, but even if it did, you don't adopt that dictionary meaning if it is inconsistent with the context and history and common sense of the statute.

THE COURT: If you're going to talk about something other than 568, probably time to do that.

MR. WAXMAN: I would very much like to talk about the Sherman Act and also antitrust injury.

THE COURT: Yeah. Let's focus on the better of those two points or the one that you want to talk about the most. As you know, 15 minutes gets wiped out pretty fast.

MR. WAXMAN: Okay.

THE COURT: We're getting there.

MR. WAXMAN: Okay. So let me make the following points.

Exemption aside, the complaint doesn't plausibly

allege price fixing pursuant to per se treatment.

The plaintiffs don't and can't dispute and Congress has repeatedly found and the Justice Department acknowledges -- and the plaintiffs do as well in paragraph 254 of their complaint -- that schools compete vigorously on price because notwithstanding an agreement to not only develop the consensus methodology which is, in fact, what these schools do but also, as alleged, to, quote, use the methodology as the means to determine the amount that a family can afford to pay, the schools are entirely free to set tuition at an amount of their choosing, to offer merit, athletic, or other types of aid, to determine whether the aid will be in the form of a grant, loan, or work study, and to offer additional need-based aid.

Schools are entirely free either to say, "Okay. I know what the consensus methodology shows, but I'm going to give this applicant a full ride" or "I'm going to give this applicant -- the net price will not be tuition, room and board minus the consensus methodology number. I'm going to give them additional aid." Or the school can basically say, "Okay. I recognize that the family needs this. I'll provide it in the form of a loan which it does not lower the net price."

And so there really --

THE COURT: It doesn't lower the net price, but, I mean, nobody's suggesting, I would assume, that there's no

difference between pay me $10,000 in the tuition bill you're going to get at the beginning of the first semester versus pay the bank 10 years from now over time.

MR. WAXMAN: I'm not arguing that there's no difference. I, in fact, was a beneficiary of financial aid in the form of loans only.

The point is that the plaintiffs haven't alleged that these schools don't compete vigorously on the net price that they charge admitted students.

Indeed, as I said, their statement in paragraph 254 which says, "Unlike the overlap group, the 568 group does not agree to allocate aid solely based on financial need."

And the Justice Department in its statement of interest says right up front the schools using the consensus methodology compete vigorously on price charged.

And so the notion that this is price fixing at all, much less price fixing that is subject to per se determination -- per se treatment -- is wrong. And --

THE COURT: Even if there's some competition over price, if what a group does is kind of sets boundaries on that and says, "You can compete within the boundaries but not outside the boundaries," wouldn't that be problematic under the Sherman Act anyway?

MR. WAXMAN: Yes. And it also would be extraordinarily different from this case because schools using

the consensus methodology -- two schools using the consensus methodology looking at a common applicant, one school could decide, "Look, we really, really want this kid, so we're going to give her a full ride" or "We're going to double the amount of aid, grant aid that the consensus methodology indicates." Or a school can say, "We're not going to offer any aid at all." There's no dispute about that.

And there is an additional point on --

THE COURT: If you do your additional point, then he's not going to get to talk. And I don't want to harm him because you're at about 20 minutes right now. So save it for rebuttal.

This other gentleman, come on up. Just give your name for the record so the court reporter can get it down.

MR. MOOPPAN: Hashim Mooppan.

THE COURT: All right. You heard my question.

MR. MOOPPAN: I did. Before, Your Honor, if I could just mention that I was passed a note. Apparently, the audio link is not working for people outside of the court.

THE COURT: Oh, my. Okay.

Melissa, we were supposed to do that?

Unfortunately, we're not going to be able to fix that.

MR. MOOPPAN: As to your question, Your Honor, we think that the burden of pleading continued membership in the

conspiracy at the time of the injuries asserted is part of plaintiffs' element of --

THE COURT: So pretty much every case except a case out of circuit says otherwise, right? And granted that they're mostly criminal cases, but --

MR. MOOPPAN: So I think that the criminal-civil distinction is fundamental here. The reason it's an affirmative defense on the criminal side is because as the Supreme Court explained in *Smith*, the criminal offense is complete upon the agreement. But in the civil context, the critical difference is that the central element of a civil antitrust suit is that the injury is caused by the defendants' challenged conduct. That's what differentiates a criminal suit from a civil suit.

THE COURT: Why would that mean that the burden of proof gets shifted for this particular issue?

MR. MOOPPAN: Because as the Eighth Circuit explained, if they need to prove injury caused by the defendant's challenged conduct, if the defendant wasn't a member of the conspiracy at the time of the injury they're complaining about, they can't show that the defendant's challenged conduct injured them.

THE COURT: Well, time out.

I mean, if I'm suing a bunch of conspirators, I don't have to prove that each one of them injured me, do I? Don't I

have to prove that somebody acting pursuant to the conspiracy injured me?

MR. MOOPPAN: That's right, because the defendant's challenged conduct of joining the conspiracy makes them responsible for the acts of their co-conspirators that are in furtherance of the conspiracy. But that logic breaks down once the defendant is no longer a part of the conspiracy. That's the central point that the Eighth Circuit recognized in *Krause*.

And they, I don't think, have cited any cases --

THE COURT: Let me ask you a different question.

So aren't there allegations in the complaint that these particular defendants didn't really withdraw?

MR. MOOPPAN: I'm sorry. I didn't hear that.

THE COURT: Aren't there allegations in the complaint to the effect that these particular defendants didn't actually withdraw?

MR. MOOPPAN: To the contrary, Your Honor. The complaint says -- the amended complaint says that they claimed to withdraw, and they don't --

THE COURT: Right.

MR. MOOPPAN: And then the complaint doesn't have any allegations to the contrary, none. In fact, it's the exact opposite. It incorporates the website, and the website's membership lists make perfectly clear that Brown, Chicago, and

Emory all did withdraw by no later than --

THE COURT: Well, it just means they're not declared members, right? It doesn't necessarily mean they're not still doing it?

MR. MOOPPAN: So the withdrawal standard is whether there's a cessation of participation and an affirmative act communicating the cessation to the other members. I think that is established by the fact that the --

THE COURT: Pause right there, and I'm going to have to move on to the plaintiffs' side on this.

So you're saying that it's enough to withdraw and then communicate your withdrawal, period? That's it? You don't have to do anything to repudiate it or anything like that?

MR. MOOPPAN: That's correct, Your Honor.

The cases that they've cited where there's a suggestion that merely communicating withdrawal is not disavowal or all cases where there's a removal from employment but not a removal from the conspiracy, here, the group is the conspiracy.

And I would point Your Honor --

THE COURT: In the standard jury instructions that we give to juries in criminal cases about withdrawal talk about repudiation. You're saying that's not the requirement in this context?

MR. MOOPPAN: No, I agree that the standard is repudiation. My point is that when the conspiracy that is alleged is the very thing that the defendant says that they're withdrawing from, that is a repudiation. And I think the best case for that is actually a case that they cite. It's the *Winn-Dixie* case.

THE COURT: Well, you know if what you just said was right, Mr. Nagelvoort who was tried in this courtroom would have won.

MR. MOOPPAN: Well, no, Your Honor. So I think *Nagelvoort* is different because *Nagelvoort*, the withdrawal was from employment. He never actually said, "I withdraw from the underlying conspiracy involving Medicaid kickbacks" or whatever it was in that case.

THE COURT: Okay. Thanks.

So I think the plan on the plaintiffs' side is I said the government is going to go first and use its time, which I'm going to protect the other folks and I'm going to hold you to exactly five minutes.

So just for anybody who comes up over here, you're going to have to give your name as you come up.

So go ahead.

MR. DUNN: Your Honor, Eric Dunn on behalf of the United States.

THE COURT: All right. Go for it.

MR. DUNN: Thank you, Your Honor. I appreciate the opportunity to be at the hearing today.

I'd like to explain why the United States filed the statement of interest in this case and address two arguments from defendants' reply: The incorrect assertion that there is an actual knowledge or conspiratorial intent requirement under the Sherman Act or the 568 exemption and the incorrect argument that an agreement on how to calculate financial aid cannot be per se unlawful.

The United States has a significant interest in this case because a decision on how the per se rule applies here may affect the legal standard in other cases brought by government enforcers in this area or others. And a decision on the scope of the 568 exemption may affect how courts interpret other exemptions like Capper-Volstead and McCarran-Ferguson.

I'd like to address the two points from defendants' reply. First, nothing in the text of the 568 exemption or the antitrust laws justifies creating an actual knowledge or conspiratorial intent requirement; and creating such a requirement could have significant impacts beyond this case.

Defendants are asking the Court to write this requirement into the statute by confusing the legal principles related to three distinct issues: First, whether the defendants entered into an agreement; second, whether each

defendant is liable as a co-conspirator as part of that agreement; and third, whether conduct is covered by the 568 exemption. But defendants' knowledge of whether their agreement was illegal is not relevant to any of those issues.

THE COURT: So you're basically saying that knowledge is relevant on issue one but not on issue three?

MR. DUNN: Well, it --

THE COURT: You have to knowingly enter into an agreement, right?

MR. DUNN: You have to knowingly enter into an agreement, but whether you know that agreement is unlawful is not relevant.

THE COURT: I get that, but you can't accidentally enter into an agreement.

MR. DUNN: Knowledge and intent can be relevant in what -- I think where defendants are confusing the issues is what knowledge and intent matters.

THE COURT: Okay.

MR. DUNN: So defendants cite cases like *Marion* which talk about a conscious commitment to a common scheme. But that's the standard for using circumstantial evidence to infer the existence of an agreement, and it's not relevant here; and it does not mean that plaintiffs must show that defendants knew their conduct was illegal.

The same is true for the unwitting conspirator

language defendants cite in their brief.

In determining whether a particular university is liable as a member of the conspiracy, knowledge and intent can be relevant to whether that university joined the conspiracy knowing its knowledge and scope -- knowing its nature and scope, but that is not the same thing as knowing their conduct was illegal.

The only mistake of fact relevant to joining an agreement would be a mistake about the nature and scope of the conduct involved in the agreement, not whether the agreement itself was illegal or whether any other member of the conspir --

THE COURT: So what you're basically talking about here is this whole issue about whether University A has to know exactly what University B is doing, right?

MR. DUNN: Correct.

THE COURT: Okay. I just wanted to make sure I got it. Go ahead.

MR. DUNN: Finally, there is no knowledge or intent requirement under the 568 exemption. Defendants have not identified any statutory text or case supporting such a requirement. And writing that requirement into the statute is contrary to the well-established principle that antitrust exemptions should be interpreted narrowly in favor of promoting competition. And courts have rejected the exact

argument that defendants are making here in the context of the Capper-Volstead Act and other exemptions.

Second, contrary to defendants' reply, an agreement to use a common methodology for calculating financial aid can be per se unlawful.

As the Supreme Court has made clear, price is the central nervous system of our economy. An agreement that interferes with the setting of price by free market forces, including agreements to stabilize or eliminate price competition, are per se illegal under the antitrust laws. And that is true whether the agreement is an outright agreement over prices or a component of prices, including pricing formulas.

The defendants' response is to say that their agreement has a tangential relationship to the price students pay for college, and so it shouldn't fall within the per se rule against price fixing. But that is contrary to *Sacony-Vacuum*.

Defendants have also argued that because they still compete on some aspects of price, their agreement cannot be per se illegal. Again, that is inconsistent with *Sacony-Vacuum* and cases from this circuit like *High Fructose Corn Syrup* where the Court said that even though no one actually pays the list price, an agreement fixing the list price is still per se unlawful.

THE COURT: The aspect of this that you're arguing, does it touch on whether I even have to get to the per se ruling, in other words, whether there's enough here, assuming the rule of reason applies?

MR. DUNN: The argument I'm making is just focused on the per se rule.

THE COURT: So I'll leave that for the other folks.

MR. DUNN: In closing, apart from those two issues, defendants incorrectly suggest in this argument and in their brief that because the United States didn't address certain issues in our statement of interest, we agree with the defendants on those issues. No inference should be --

THE COURT: I wouldn't have assumed that.

MR. DUNN: I'm just encouraging the Court not to draw that inference.

Unless the Court has further questions, I'll sit down.

THE COURT: Thanks.

MR. DUNN: Thank you.

THE COURT: Okay.

MR. NORMAND: May it please the Court.

THE COURT: Your name?

MR. NORMAND: Ted Normand. With my co-counsel, I represent the plaintiffs.

The parties are disputing a lot of issues,

Your Honor.

THE COURT: Here's where I want you to start, and it's really with the example, I guess, that Mr. Waxman talked about which seems to me to be to the extent you have a weak point on the interpretation of the 568 exemption, it's that.

In other words, it's this proposition that, wait a second, if the plaintiffs are right, a university can't even look at the fact that a person, just generally speaking, has poor financial circumstances and take that into account as kind of a plus factor.

In the response brief, you basically say, yeah, that's okay to consider that because that doesn't really count as financial circumstances. Or at least I think that's the argument, but I need you to flush it out for me.

MR. NORMAND: Well, it's our secondary argument, is the first thing I would say.

The primary point which the defendants have ignored and Mr. Waxman ignored is that even under their interpretation of "need blind," we have stated a claim, and the exemption doesn't apply.

As he said, the definition of "need blind" that they adopt -- we disagree with it -- is are you considering whether a student needs financial aid. And we specifically allege with respect to wait list and transfer students who constitute thousands of students every year at these schools that these

schools do consider whether those students need financial aid.

So that falls directly under the statute. It's a specific plausible factual allegation. It's the factual content of our complaint. As Your Honor said in *Hunter*, what's the factual content. The factual content is -- and we give many examples in the complaint -- that these schools do consider whether those students need financial aid.

So our view is that satisfied the statute, and the Court may never have to resolve the secondary issue that you raised for me. It may never have to resolve that in this case.

If the schools had not admitted all students on a need-blind basis, the exemption goes away. And we allege that as to each school.

The only argument, as I understand it, Your Honor, on this issue is the argument that the standards of conduct that preceded the exemption had an exception for wait list students.

They don't make any argument that there was ever an exemption for transfer students. Their argument is, well, the standards of conduct on which the exemption is based had an exception for wait list students. But the exemption doesn't.

The only reasonable inference -- and the Supreme Court said this in 1992 in *Germane* -- is to assume that Congress didn't make a mistake. And even the underlying

legislative history aspect of that argument holds no water. It's clear that the exemption is not based in whole or part on the standards of conduct.

THE COURT: You don't really have to spend much time on that argument. Why don't you get to the --

MR. NORMAND: As to the secondary issue, Your Honor, as I understand it --

THE COURT: Yes.

MR. NORMAND: As I understand the spirit of Your Honor's question, it's twofold. First of all, it would have to be, as the courts have said, preposterous to think that Congress when it used the phrase "financial circumstances" meant financial circumstances. It's not preposterous.

Just as fundamental, the courts have always interpreted "without regard to" to mean that there can be consideration of a disadvantaged class. The Foreign Services Act, the Federal Highway Act, the Office of Contract Compliance for federal affirmative action programs, the City of Chicago's affirmative action programs, all of these statutes and starting with President Johnson's 1965 executive order on federal contractors, all of these statutes say two things at the same time: One, you can't make a decision on hiring or other activity with regard to race; but two, there can be affirmative action.

THE COURT: I just have to tell you, I would not in the summer of 2022 want to put all my eggs in the affirmative action --

MR. NORMAND: Understood, Your Honor. Understood. With the Supreme Court --

THE COURT: Just saying -- I don't know about that, but I'm just saying I'm not sure I'd want to put all my eggs in that basket. But, you know, that aside, I mean, I guess just from a standpoint of, you know, arguing the plain language, once you say that the plain language doesn't really mean the plain language, in other words, "financial circumstances" means "financial circumstances" for all of this but not for this one thing, I mean, I'm not -- I guess I'm struggling a little bit with the idea of why doesn't that mean that we just don't look at plain language.

MR. NORMAND: Let's keep in mind what the framework for statutory interpretation would be here, and let's then talk about whether that would be an unreasonable result.

So the framework in *Digital Realty* from the Supreme Court is you look to the specific statutory definition. The Supreme Court said the same thing in *Tanzin* a year later. You look to the specific statutory definition. And you do that, Justice Thomas said in *Tanzin*, even if there are plausible arguments for why the ordinary meaning of the defined term should be given that meaning. You overlook that. You look to

the specific statutory definition. That's what we do here.

And then in *Van Buren*, the Supreme Court said just last year you look for the best reading, what is the reading that best fits on balance.

Under all those interpretative frameworks and the standard that if you consider financial circumstances and you take it in the most literal way, as Your Honor has said, that wouldn't be a preposterous result.

We have the far better reading of the statute. Our reading doesn't lead to any absurd results. Their reading leads to a truly absurd result which is they could nearly fill their classes with high-income individuals. They could consider financial circumstances, and in a statute whose entire purpose, as is clear from the plain language, is designed to benefit people who need financial aid, they could ignore those who need financial aid.

This goes back -- I know Your Honor says that the legislative history or the background of the standards of conduct is sort of secondary, but the standards of conduct said these schools would have to meet the full need of any students who were applying for financial aid. The exemption doesn't say that.

And if you were to ask these defendants, "Are you obligated to provide full need for students who need financial aid," they'd say, "No, we're not, and the reason we're not is

because it's not in the exemption."

So we know that the plain language of the exemption in critical respects does control, Your Honor.

I know my time is short, so I would move to injury.

Again, the framework, the Supreme Court said 30 years ago in the *FTC* case, "For a per se claim, the plaintiff does not have to allege that competition is eliminated."

And it is not a fair reading of our complaint to say that we failed to allege that competition has been reduced. We repeatedly allege --

THE COURT: That's basically my point about putting a boundary. We're going to compete inside the boundary, but you can't go outside. That's still a violation.

MR. NORMAND: As the government said 30 years ago, it creates a price floor. There's an agreement to make students and their families pay the maximum that they're able to pay. That threshold decision is itself anticompetitive.

It's not at all self-evident that competitors offering a product for sale would agree that the consumer should have to pay as much as they can afford to pay. So that threshold decision is anticompetitive.

But I took Mr. Waxman's point to be that there's somehow a failure in the pleading, and we repeatedly allege that competition is being reduced and that it's the natural inference to draw from the horizontal agreement.

The Supreme Court has explained that, and the Second Circuit has agreed. And this district in *Wheat Rail* agreed that if you --

THE COURT: I have to give a shout out to whatever found that case. Somebody did their research. That's all I'm going to say. You'll figure it out.

MR. NORMAND: It's on point. It was affirmed by the Seventh Circuit, and as you know, I guess --

THE COURT: I'm just saying. Somebody did their bio pretty well.

MR. NORMAND: That case says an agreement on how to set rates is anticompetitive.

The Second Circuit said in *Gelboim* an agreement on a component of price is anticompetitive; it's a per se problem.

So we clearly allege, we submit, Your Honor, injury.

There's two further issues that were raised, statute of limitations and this issue of withdrawal. I raise both of those together because they're both affirmative defenses.

THE COURT: Yeah. So talk about that since the gentleman talked about it a little bit. So, I mean, his argument is that it's different from criminal, the burden is on you in this situation, not on them because it's a different -- what has to be proven for criminal liability versus civil liability is different.

Can you talk about that a little bit?

MR. NORMAND: Yes.

So the Supreme Court said in *Smith* in 2013 it's an affirmative defense. There's no indication in any aspect of the Supreme Court's reasoning that it was specific to criminal versus civil.

We've got a series of cases that --

THE COURT: When you say "it," what's the "it"?

MR. NORMAND: The question of the burden of proof and what to show for purposes of withdrawal.

This Court in *Sulfuric Acid* in 2010 in footnote 12 specifically says in a civil antitrust conspiracy, the burden of proof, denying summary judgment in that case, is on the defendant.

We've seen just this year from other courts, federal courts, applying *Smith* in the context of civil antitrust conspiracies. The *GN* case in the District of Maryland just a few weeks ago and the *Seafood Packaging* case in the Southern District of California in March, both of those cases saying it's an affirmative defense, civil antitrust, and it's for the burden to prove, and it's fact intensive.

THE COURT: What about the argument that, okay, it's pleaded in the complaint incorporating the website or whatever it is? Because you say that they've said they withdrew, and then if you look at the website, they're not on it anymore. And that is enough, I think, was at least part of the

argument.

MR. NORMAND: The only facts that we allege is that they don't identify themselves as part of the conspiracy.

They say, "You should infer from that that we decided not to be in the conspiracy." First of all, that's not the only inference, but even if you were to infer that, even if you were to infer that we allege that they're not in the conspiracy any longer, the Seventh Circuit has specifically and twice rejected the argument that was made.

In *Nagelvoort*, the Seventh Circuit looked at the way other circuits had addressed withdrawal, where in other circuits, it's enough to say that you stopped participating. And the Seventh Circuit said that's not enough.

In *Vallone*, the Seventh Circuit specifically looked at a prior Seventh Circuit case in *Wilson* and clarified the holding in *Wilson* and said it is not enough to say that you just stopped participating.

So I think the standard is wrong. I think it's clear that in this district, you have to allege an affirmative act, a disavowal.

And so the point on the motion to dismiss, Your Honor, is we don't allege those facts. In order to have pleaded ourselves out of withdrawal, we would have had to have alleged something like Brown, Chicago, and Emory disavowed and stopped participating. And in the language of these civil

antitrust cases from this year, *GN* says you have to show that you stopped benefitting from the conspiracy, and *Seafood Packaging* says you have to have severed all ties with the conspiracy.

We don't know as a matter of fact whether that happened, and we certainly don't allege, Your Honor, that it happened.

Same thing with respect to statute of limitations and the exemption itself. These are affirmative defenses.

As an example, Your Honor, we've pled around the need-blind matter in the affirmative defense of the exemption, but there's other language in the exemption that it is going to be defendants' burden to prove. They have to prove that they exercised independent professional judgment with respect to individual applicants. That's their burden on an affirmative defense.

And the same holds true for statute of limitations. I know it wasn't addressed, but I wanted to use my time to address it. That's an affirmative defense.

THE COURT: Oh, there's one question I want to ask you about that. So I don't remember if it's in the opening brief or in the reply. The defendants say, "Well, you don't read discovery rules into federal statute of limitations anymore. You read them" -- it's based on that. I think it's a, I think, fair debt collection practices case that was

decided a few years ago.

Anyway, my question for you is this. So I think it's still the law. In fact, I'm pretty sure it's still the law that equitable tolling is still read into the federal statute of limitations. It's presumed, in other words, unless it's refuted.

I would assume that at least in this circuit, a person doesn't have to plead around statute of limitations by affirmatively alleging the bases for equitable tolling.

MR. NORMAND: That's correct, Your Honor. A plaintiff doesn't have to plead around the statute of limitations at all. It's an affirmative defense.

THE COURT: Let's just say hypothetically -- and let's just step away from the complaint for a second. Let's just say I was looking at equitable tolling here. And so generally speaking, what equitable tolling is is that the plaintiff exercised due diligence and there was some unusual or extraordinary circumstance that prevented them from discovering the claim. Is that something down the road that is going to be able to be shown in this case?

MR. NORMAND: I don't think it's going to be necessary for us to show that. And with respect to a class, because the way Your Honor described --

THE COURT: I'm talking about individual plaintiffs might be chopped out but the class as a whole would not.

MR. NORMAND: That is not the standard on the discovery rule. So I know it's not lost on the Court, but the Second Circuit has made clear, including just a few weeks ago in *Vasquez*, the discovery rule does apply to the Sherman Act in this circuit.

And the Seventh Circuit in reversing *Sidney Hillman* in 2015 made the point that it is only if there is no conceivable set of facts under which the plaintiff didn't discover.

THE COURT: I say that to defendants on motions to dismiss probably twice a week.

MR. NORMAND: And finally, Your Honor, in *In re Broiler*, this district made the point that the question on the discovery rule is not, in fact, whether a plaintiff exercised due diligence but rather the abstract question of whether a reasonable person in the plaintiffs' position would have discovered the injury sooner. That's the standard that's amenable to class certification. The courts have done that repeatedly.

And the last thought there, Your Honor, as well on the statute of limitations, the Seventh Circuit has said in *Fish* in 2014 if there is an obviously applicable affirmative defense, it's a Rule 11 problem to bring a claim.

So the definition and whether these schools were need blind was part of the calculus as to whether plaintiffs could,

without running into trouble, bring a lawsuit and when they could have brought that lawsuit.

Thank you, Your Honor.

THE COURT: Thanks.

All right, Mr. Waxman, you've got five minutes.

MR. WAXMAN: Thank you, Your Honor. I think I want to -- sorry.

THE COURT: It works for me either way. I can hear a little bit better with it off.

MR. WAXMAN: It works a lot better for me to not try and breathe through an N95 mask.

So I have five points that I'd like to make. The first is with respect to whether this is a per se violation. Independent of why this is not remotely price fixing, much less price fixing that is subject to per se treatment, there's an independent point. Through multiple reenactments, Congress has found that the collaboration has procompetitive benefits.

The Department of Justice in its standards of conduct expressly provided a safe harbor for collaborating schools, which means the department -- which it has not withdrawn -- which means the Department of Justice doesn't think that this collaboration is an antitrust violation, much less a per se antitrust violation.

And there is only one court that has ever examined a claim like this, and the court in *Brown* insisted on full rule

of reason treatment. And those three facts independent of anything else under the Supreme Court's decision in *BMI*, they preclude per se treatment.

My second point is that the plaintiffs' rule of reason argument fails because their candidate market is an implausible litigation construct.

There's no reason to think -- and they allege no facts to think -- that schools, many, many schools outside this artificial litigation construct based on an 18-year average of ratings of certain schools by one defunct magazine actually in the real world --

THE COURT: Wait a second. Which is the defunct magazine?

MR. WAXMAN: "US News and World" --

THE COURT: They're defunct? I did not know that. It was the thing, right?

MR. WAXMAN: It used to be a thing.

THE COURT: Okay.

MR. WAXMAN: Now it's a rating.

THE COURT: It's a new thing I learned today.

MR. WAXMAN: Now it's one of many rating services.

I mean, they allege no facts to -- that the *US News* average top 25 university ranking is a relevant market, given that it gerrymanders out competition from a whole variety of schools that obviously are competitors. NYU, for example,

which is ranked 27 would surely be surprised to know that it is not competing with Columbia for students.

My third point is even if none of this were correct, the complaint must be dismissed because not a single named plaintiff has plausibly pled antitrust injury.

Even assuming that the challenged collaboration might have some anticompetitive effect at some schools for some student, it's entirely speculative whether any of these plaintiffs suffered any injury at all, in other words, whether in the but-for world they would have received more, less, or the same amount of financial aid, because they don't plead anything about their particular financial or admission circumstances.

The fourth point goes to the point that the Justice Department began with which is essentially the argument that for purposes of the exemption, if one school turns out not to be need blind, that is one school. Notwithstanding annual certifications that they are, one school admits one student taking, I don't know, need into account, the lack of need into account, all of these schools lose their ability to -- lose the safe harbor of the exemption.

That interpretation, Your Honor -- under that interpretation, no school could ever join this conspiracy, this --

THE COURT: It would be too risky, basically.

MR. WAXMAN: Not only is it too risky, but schools are -- it's simply impossible for each one of these schools to have a continuous audit of each admissions decision made and the financial aid offered with respect to all of their students to make sure that it was really need blind. It's, A, impossible. And because it's impossible, it means that in enacting 568, Congress created a null set. It created an exemption which no schools would ever agree.

THE COURT: What's your fifth point?

MR. WAXMAN: My fifth point relates to the comments that Mr. Normand made, you know, that somehow, the exemption is an affirmative defense.

If the exemption is an affirmative defense, reading it to be an affirmative defense would impose on schools the exact litigation costs and burdens that Congress said was the reason it was creating the exemption. That is the whole purpose of the exemption is to allow schools that are practicing need-blind admissions within 568 not to undergo litigation.

And the plaintiffs' argument is yes, they can prove that as an affirmative defense sometime along the way in either a summary judgment or trial. That frustrates Congress' purpose. And moreover, this is not written as an affirmative defense.

This is a case -- this exemption is worded very, very

analogous to the statutory labor exemption that was at issue in the Seventh Circuit in the Mid-America Regional Bargaining Association.

THE COURT: I have to tell you, I think that point is adequately covered in the brief, so I'm going to cut you off. I'm going to do one more thing, though.

So I just totaled up the time. You guys have had collectively 29 minutes, and the plaintiffs had 20, and there were two questions I forgot to ask the plaintiffs. So I'm going to ask them those two questions. So if plaintiffs' counsel could come up.

One has to do with what I'll call the "How could you possibly police this exemption issue," in other words, the thing about intent.

The point was made -- I think it was made by Mr. Waxman, I think, originally and then again in rebuttal that you can't rationally interpret the exemption to say that it's effectively -- I'm going to use a phrase not exactly in the right way -- strict liability. In other words, if you read it to say that it doesn't matter whether University A knows that University B is complying, it would be effectively -- the exemption would be a dead letter.

So that's one of the two points. I've now forgotten the other point, so while you're talking about that, I'll remember what the first one is.

MR. NORMAND: Thank you, Your Honor. And if I could respond to Mr. Waxman's comments as well.

There's no knowledge requirement set forth in the statute, so the plain language of the statute controls. There's no difference or distance between this statute and --

THE COURT: No, I get that, but, I mean, I think the argument is that you've got to read -- you've got to read some sort of knowledge requirement into it because otherwise, it would effectively be a dead letter because no rational university would ever go along with the -- you know, with the common scheme or whatever it is.

MR. NORMAND: Well, to the extent they're making a prediction of how facts would unfold --

THE COURT: Everybody would have to be the insurer of everybody else, in other words.

MR. NORMAND: But that's exactly the risk on the federal statutes that work the same way. That's the risk under Capper-Volstead; that's the risk under McCarran-Ferguson with regard to insurance companies.

THE COURT: McCarran is pretty easy. You've just got to make sure there's nobody that's not a farmer in there. This is much harder because you have to dig into what each other school is doing.

MR. NORMAND: Well, I'm sure you've read the case, but if you read *National Broiler*, it was a pretty close call

as to whether that person was most of the time a farmer or not.

So this is an example of how it's a function of the narrow and strict interpretation of antitrust exemptions. And there's nothing unusual about the operation of the statute where if you know you're -- as with any conspiracy, if you understand you're entering into a conspiracy, then you run a risk.

THE COURT: Before I forget it again, the other thing I wanted to ask you about was this market definition issue. In other words, if I forego at this point, at least initially, assessing per se yes or no, their argument is that you fail under the real reason, one of the reasons being is that the market, as you've defined it, makes no sense.

MR. NORMAND: Well, we'd allege direct anticompetitive effects. And so when you do that, first of all, in the Seventh Circuit, all you have to show is the rough contours of the market.

We've alleged in detail that these defendants themselves regard the market we've defined as essentially the market in which they compete. So there's no reasonable inference that the market that we've described isn't at least the rough contours of the market at issue.

THE COURT: And the market as you've defined it is what? It's top 25?

MR. NORMAND: The top 25 private national universities. And as --

THE COURT: The fact that you haven't sued all of them doesn't really matter because you don't have to control the entire market in order for there to be an antitrust violation?

MR. NORMAND: That's correct.

THE COURT: Yeah.

MR. NORMAND: That's correct, Your Honor.

The *BMI* case that Mr. Waxman cited, that's not applicable because there's no -- we don't allege, as was the case in *BMI*, that these defendants would be unable to negotiate individualized financial aid offers. We don't allege that they have to get together in order to make this even work.

THE COURT: So you've got one or two final points. Just go ahead and make them, and then we're going to stop.

MR. NORMAND: Well, Your Honor, the only thing I would say to your question earlier about the consideration of financial circumstances, as we note in our opposition brief, -- this is at Note 9 -- is that this language about consideration of financial circumstances doesn't bar the schools from considering, as we say, applicant strengths in overcoming adversity or helping others overcome adversity such as homelessness, poverty, substance abuse, gun violence, other

forms of trauma. That's different from considering financial circumstances as such as the sole factor in whether to admit someone.

So they're permitted to undertake a holistic analysis in the case of people whose financial circumstances have left them having to overcome other elements. The consideration of those other elements can still be appropriate under our interpretation of the statute.

Thank you, Your Honor.

THE COURT: The motions are taken under advisement. I appreciate everybody's arguments. And the briefs are all really well done, obviously, and all very helpful.

Take care.

(Proceedings adjourned at 11:59 a.m.)

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C E R T I F I C A T E

I, Brenda S. Tannehill, certify that the foregoing is a complete, true, and accurate transcript from the record of proceedings on August 2, 2022, before the HONORABLE MATTHEW F. KENNELLY in the above-entitled matter.

/s/Brenda S. Tannehill, CSR, RMR, CRR 8/2/2022

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

Date